

**BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA**

In the matter of the amendment of ARM 17.38.101, 17.38.201A, 17.38.202, 17.38.203, 17.38.206, 17.38.208, 17.38.216, 17.38.229, 17.38.239, 17.38.249, 17.38.302, and the adoption of new rule I pertaining to public water supply

HEARING OFFICER REPORT

On April 30, 2003, I conducted a public hearing in Room 111 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana, to take public comment on the proposed adoption of the amendments to ARM 17.38.101, 17.38.201A, 17.38.202, 17.38.203, 17.38.206, 17.38.208, 17.38.216, 17.38.229, 17.38.229, 17.38.234, 17.38.239, 17.38.249, 17.38.302, and the adoption of new rule I pertaining to ground water under the direct influence of surface water determinations, included in Montana Administrative Register (MAR) Notice No. 17-190, published on April 10, 2003, a copy of which is attached to this report.

The hearing began at 10:07 a.m. The hearing was taped by the Department.

At the beginning of the hearing, I stated the date and number of the MAR notice, invited everyone to get a copy of the MAR notice which was available if they didn't already have one, and read the "Notice of Function of Administrative Code Committee" referred to in Mont. Code Ann. § 2-4-302(7)(a).

Eugene Pizzini, Compliance Officer for the Public Water Supply Section of the DEQ, testified in support of the proposed rulemaking. Jolyn Eggart, a staff attorney for the

DEQ, submitted an analysis of House Bills 311 and 521 issues (codified at Mont. Code Ann. §§ 75-2-207 and 2-10-101 through -105), though she did not testify. Copies of Ms. Eggart's analysis are attached.

Two opponents appeared at the hearing. Ronald Spornadeo testified on behalf of the Barnaby Lake Home-Owners water system. George Waldner testified on behalf of the Birch Creek Colony in Valier, Montana. The public comment period remained open after the hearing until 5 p.m., May 8, 2003. One written comment was received from Harvey Fredericksen.

SUMMARY OF HEARING TESTIMONY

Eugene Pizzini, Public Water Supply Bureau, Montana Department of Environmental Quality

Mr. Pizzini testified that the Board is proposing to adopt the proposed changes to the Administrative Rules of Montana (ARM) Title 17, Chapter 38, subchapters 1, 2, and 3 to update existing rules regarding public water supplies by making the rules consistent with the law and by incorporating by reference the most recent applicable sections of the Code of Federal Regulations. These proposed amendments are necessary to allow the Department to enforce the public water supply laws and to retain primacy for enforcement of safe drinking water laws. The policy of the Montana legislature has been for state agencies to retain primacy over environmental and public health programs.

New federal regulations that the Board is proposing to adopt by reference include the radiological maximum contaminant levels, the recycle provisions, siting requirements, and prohibition on the use of lead pipes, solder, and flux.

Rule changes include clarifications and updates to rules and definitions for existing rules, new rules to accommodate new federal requirements, and clarification of federal requirements.

The department is required to adopt new federal requirements within two years of publication regardless of the effective date of the rule. Because the department adopts the federal effective date with a new rule, the proposed rule would not be more stringent than the federal rule. By adopting the standards now, the department will be able to help identify systems that may have issues with the new standard, systems will know the standard they must meet, and systems may be able to locate funds if treatment is required.

Federal Register Vol. 66 contained language for “Clarifications to Compliance” that outlined the way in which EPA intends states to make inorganic maximum contaminant level determinations. That determination process is the process the department is proposing to adopt. This new determination process, as being adopted by the department, reflects the EPA’s clarifications to compliance and is therefore the intended federal standard.

As the department is adopting the 2001 version of the CFR’s and the EPA corrected a problem with the arsenic standard in the 2002 CFR edition, the department is proposing to incorporate the corrected standard within our rules in order to avoid systems trying to comply with an inaccurate arsenic standard.

The department identified some errors in the proposed rule document that it corrected at the hearing:

1. On page 625 in the “Reason” section of ARM 17.38.101, in the third paragraph, the term “inspection” should be “specifications.”
2. On page 631, ARM 17.38.234(3)(e) states “40 CFR141.76(b) and (d) which set forth the reporting and recordkeeping requirements for **lead and copper.**” It should read “**the recycle provisions.**”
3. On page 632, ARM 17.38.249, the title of the rule does not adequately describe the rule. The department proposes to rename the rule, “17.38.249 CERTIFIED OPERATOR AND DESIGNATED CONTACT PERSON.”
4. On page 632, ARM 17.38.249 (2) incorrectly requires that the designated contact person be certified in accordance with the requirements of Title 37, chapter 42, MCA. The department deleted the last line of this subsection.
5. On page 632-3, ARM 17.38.249 (3) incorrectly requires the owner to notify the department of a change in assigned responsibilities. The department proposes to correct this error by only requiring department notification in the event of a change in “certified operator or designated person.”

Jolyn Eggart, Legal Counsel,
Montana Department of Environmental Quality

Ms. Eggart’s memorandum states that the amendments adopt the comparable federal requirement so no House Bill 521 findings are necessary. Ms. Eggart notes that while the proposed rules adopt by reference 40 CFR 141 (2001) which contains the outdated arsenic standard of 0.01 mg/L. However, the department is proposing to modify the language of 141.62(b)(16) to set the arsenic standard at 0.010 mg/L which is the current EPA standard as of March 25, 2003 (see 2003 Federal Register Vol. 68, No. 57). Therefore the proposed standard is commensurate with existing federal standards. Ms. Eggart also notes that in ARM 17.38.216 the department is proposing to adopt the inorganic contaminant

(IOC) determination process as described in the 2001 Edition of the Federal Register (Vol. 66, No 14, January 22, 2001). The language which the department proposed to adopt reflects the clarifications to compliance which outlines the way the EPA intends for states to make IOC maximum contaminant level determinations. Therefore the proposed standard, which the department seeks to adopt, is the intended federal standard, which requires no HB 521 findings.

House Bill 311, codified as Mont. Code Ann. §§ 2-10-101 through -105, requires the state to assess taking or damaging impact of an action that has taking or damaging implications for private property. Amending the public water supply rules may affect real property or water rights and the Board has discretion in some instances legally not to take the action or to take the action in a manner that would have less impact on private property therefore, the Private Property Assessment Act applies to this proposed rulemaking and completion of the Attorney General's checklist is required. Ms. Eggart submitted a checklist supplied by the Attorney General's office in accordance with House Bill 311, which shows the amendments will have no taking or damaging implications, and further House Bill 311 analysis is not necessary.

Ronald Sperandeo, Opponent

Mr. Sperandeo testified on behalf of the Barnaby Lake Homeowners Association. He stated that the homeowners association is made up of 34 families that have put a lot of money into their physical plant. He stated the cost of complying with the arsenic rule will kill them. He stated that 65 percent of the homeowners are retirees on a fixed income and he can't hit them up for more money. He wants a reasonable cost effective way to fix the problem. He believes the arsenic rule should be sent back to the federal government.

George Waldner, Opponent

Mr. Waldner is the operator of the Birch Creek Colony water supply system in Valier, Montana. He, too, stated that the cost of compliance with the arsenic and radon rule would be very costly. He complained that there is no way to take arsenic out of the water.

SUMMARY OF WRITTEN TESTIMONY

Harvey H. Fredricksen, Opponent

Mr. Fredricksen states that small systems will go out of business because of the new rules. He complains that the proposed new rules add to the cost of compliance even more than what EPA calls for. He believes it is unfair to group together small systems with cities and townships that have tax-funded resources.

HEARING OFFICER COMMENTS

1. The Board has jurisdiction to adopt, amend, and repeal these rules. Montana Code Annotated § 75-6-103 provides that the Board has “general supervisory authority over all state waters that are directly or indirectly being used by a person for a public water supply system” That section also provides numerous instances where the Board shall adopt rules and standards concerning various aspects of public water supply systems. The proposed adoption, amendment, and repeal appears to be within the scope of the Board's statutory authority and does not exceed the scope of public notice of proposed rulemaking. The public notice, public hearing, and public comment met the requirements of Mont. Code Ann. § 2-4-302.

2. The amendments and new rule are not more stringent than existing federal standards, therefore HB 521 findings are not necessary.

3. House Bill 311 (1995), the Private Property Assessment Act, codified as Mont. Code Ann. §§ 2-10-101 through -105, provides that a state agency must complete a review and impact assessment prior to taking an action with taking or damaging implications. This rule may affect real property and the Board has discretion as to whether or not to adopt the rule or take some other action that may impact private property less than this rule. A Private Property Assessment Act Checklist is required in this matter. The proposed changes to the rules would not have taking or damaging implications because they would not:

- ✓ result in either a permanent or indefinite physical occupation of private property;
- ✓ deprive any owner of all economically viable uses of private property;

- ✓ deny a fundamental attribute of private property ownership;
- ✓ deprive the owner of all economically viable uses of the property;
- ✓ require a private property owner to dedicate a portion of property or grant an easement;
- ✓ have a severe impact on the value of private property; or
- ✓ damage private property by causing a physical disturbance with respect to the property in excess of that sustained by the public generally.

Based on these findings, no further HB 311 assessment is necessary.

4. The Board may adopt or reject the proposed rulemaking, or it may adopt the proposed measures with revisions not exceeding the scope of the public notice. Under Mont. Code Ann. § 2-4-305(7), for any acts in the rulemaking process to be valid, the Board must publish a notice of adoption within six months of the date the Board published the notice of proposed rulemaking in the Montana Administrative Register, or by October 10, 2003.

Dated this _____ day of May, 2003.

KELLY O'SULLIVAN, HEARING OFFICER